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In the Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MILDRED M. EDWARDS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ROBERT S. GREENSPAN
FRANK A. ROSENFELD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, when a district court has held an Act of Congress unconstitutional in a case to which an officer of the United States is a party, an appeal challenging the relief ordered by the district court must be taken directly to this Court under 28 U.S.C. 1252 rather than to the court of appeals under 28 U.S.C. 1291, even though the appellant does not seek review of the district court's constitutional holding.

PARTIES TO THE PROCEEDING

Respondents are members of the class defined by the district as follows (Pet. App. 4a):

> All applicants for or recipients of Old Age, Survivors and Disability Insurance benefits, 42 U.S.C. § 401 *et seq.*, on their own accounts as wage earners whose applications have been denied or for whom the monthly benefit amount has been reduced due to the omission from their earnings records of income earned while married and operating a trade or business in a community property state, as required by 42 U.S.C. § 411 (a)(5)(A).

By subsequent order, the district court confined the class to those persons who received a final decision by the Secretary denying or reducing benefits on this basis after August 20, 1980 (Pet. App. 14a).

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The order of the court of appeals dismissing the government's appeal (Pet. App. 1a) is not reported. The May 22, 1981 order of the district court granting summary judgment to respondents as to liability and class certification (Pet. App. 3a-4a), the January 22, 1982 opinion of the district court regarding relief (Pet. App. 5a-12a), and the March 19, 1982 order of the district court amending the January 22, 1982 opinion (Pet. App. 13a-15a) are not reported.

JURISDICTION

The order of the court of appeals dismissing the government's appeal was entered on July 27, 1982 (Pet. App. 2a). On October 19, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 24, 1982. The petition for a writ of certiorari was filed on that date and was granted on February 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the district court rested on 42 U.S.C. (Supp. V) 405(g).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding any Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

2. 28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States

District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT

1. Section 211(a)(5)(A) of the Social Security Act, 42 U.S.C. (& Supp. V) 411(a)(5)(A), provides that in computing self-employment earnings for purposes of social security coverage, if any income derived from a trade or business (other than a trade or business carried on by a partnership) is community income under the community property laws applicable to the income, all of the gross income and deductions shall be attributed to the husband unless the wife exercises substantially all of the management and control of the trade or business. In the latter event, all of the gross income and deductions are treated as those of the wife.

During 1980, several courts held that this provision unconstitutionally discriminates on the basis of sex by creating a presumption that the husband is to be credited with all community income. In each case, the court remanded to the Secretary for a determination of the wife's earnings without regard to the presumption in Section 211(a)(5)(A). *Hester* v. *Harris*, 631 F.2d 53, 55-56 (5th Cir. 1980); *Carrasco* v. *Secretary of HEW*, 628 F.2d 624, 627-631 (1st Cir. 1980); *Becker* v. *Harris*, 493 F. Supp. 991, 994-995, 997 (E.D. Cal. 1980). In connection with its remand order in *Hester*, the Fifth Circuit concluded that the Secretary should, in the first instance, develop new methods and standards governing a claimant's entitlement to benefits under the Act in the context of a small family business. 631 F.2d at 56-57. The First

Circuit, in *Carrasco*, likewise suggested that the Secretary should formulate a "new plan" for crediting such community income. 628 F.2d at 631. See also *Becker* v. *Harris*, *supra*, 493 F. Supp. at 996.

By letters dated September 30, 1980, the Attorney General formally notified the Speaker of the House of Representatives and the President of the Senate that the Solicitor General had determined that the government would not take an appeal from the district court's decision in *Becker* holding Section 211(a)(5)(A) unconstitutional and that the Attorney General had concluded that the presumption in Section 211(a)(5)(A) could not be defended under the standards announced by this Court in *Califano* v. *Westcott*, 443 U.S. 76 (1979), and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). See 126 Cong. Rec. H10562 (daily ed. Nov. 12, 1980).[1] This action constituted a formal acquiescence by the Executive Branch in the position that Section 211(a)(5)(A) of the Social Security Act is unconstitutional.[2]

2. On October 20, 1980, respondent Edwards filed this action in the United States District Court for the

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[1] Under Section 21(a)(2) of the Department of Justice Appropriation Authorization Act for Fiscal Year 1980, Pub. L. No. 96-132, 93 Stat. 1050, the Attorney General was required to transmit a report to each House of Congress in any case in which the Department of Justice declined to defend a federal statute because of the determination that the provision was unconstitutional. See also 2 U.S.C. (Supp. V) 288k(b). *Becker* was the first case in which the Solicitor General had to decide whether to take a direct appeal to this Court from a decision of a lower court holding Section 211(a)(5)(A) unconstitutional.

[2] The Social Security Administration subsequently published a ruling acquiescing in the decision in *Becker*. See Social Security Ruling No. 81-17c, at 40 (Cum. ed. 1979).

Northern District of California seeking judicial review under Section 205(g) of the Social Security Act, 42 U.S.C. (Supp. V) 405(g), of the final decision of the Secretary denying her application for retirement benefits. She alleged that she had taken over the operation of a rock and gem business from her husband after he began to receive Social Security retirement benefits in 1972 and that she thereafter operated the business with her husband's assistance because she is blind. Complaint ¶ 8.[3] Respondent further alleged that the Secretary denied her application for retirement benefits because she failed to demonstrate that she had exercised substantially all of the management and control of the business—which was located in California, a community property state—and that, by operation of Section 211(a)(5)(A), the income from the business therefore was attributed to her husband. As a result, she did not receive credit for self-employment income during this period and did not have sufficient quarters of coverage to be eligible for Social Security retirement benefits. Complaint ¶ 9(a).[4]

In accordance with the position formally adopted by the Attorney General and Solicitor General in con-

[3] The complaint is attached as Exhibit A to the Brief in Support of Plaintiff-Appellees' Motion to Dismiss the Appeal for Lack of Jurisdiction, No. 82-4156, filed by respondents in the court of appeals. This brief will be cited as "Resp. C.A. Br."

[4] The Social Security Act does not recognize as covered employment an individual's work in the employ of his spouse, because of the potential for fraud or abuse in allocating income resulting from a family business. See Section 210(a)(3)(A), 42 U.S.C. (& Supp. V) 410(a)(3)(A); *Carrasco* v. *Secretary of HEW*, *supra*, 628 F.2d at 629. Thus, respondent Edwards could not receive credit for any earnings as an employee of her husband in the business during this period.

nection with the district court decision in *Becker* (see page 4, *supra*), the government informed the district court in this case that it would not defend the constitutionality of the statute. It therefore requested that the court remand respondent's case to allow the Secretary to determine how self-employment income should be allocated in community property states, as the courts had done in *Becker*, *Hester* and *Carrasco* (Pet. App. 6a n.2). By order dated May 22, 1981, the district court granted respondent's motion for summary judgment on the issue of liability and denied the motion to remand respondent's case to the Secretary (*id.* at 3a). The court also certified a class of plaintiffs consisting of all applicants for and recipients of Old Age, Survivors, and Disability Insurance benefits whose benefits were denied or reduced by the operation of Section 211(a)(5)(A) due to the omission from their earnings records of income earned while married and operating a trade or business in a community property state (Pet. App. 4a).[6]

On January 22, 1982, the district court issued an opinion resolving various questions regarding relief (Pet. App. 5a-12a). The court rejected the Secretary's proposal to allocate self-employment income to class members in the same sex-neutral manner in which such income is allocated between spouses in non-community property states. The court explained that under the Secretary's interpretation of Section 211(a) (42 U.S.C. (& Supp. V) 411(a)), self-

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[6] The court subsequently confined the class to those persons who received a final decision by the Secretary entered after August 20, 1980—60 days before Edwards filed the class action in district court (see 42 U.S.C. (Supp. V) 405(g))—denying or reducing benefits on the basis of Section 211(a)(5)(A). See Pet. App. 6a, 14a.

employment income can be derived only from partnerships or sole proprietorships. Thus, in non-community property states, if a married claimant cannot establish that a trade or business was carried on in a partnership with the other spouse, a determination is made as to which spouse was the sole proprietor and all income is then allocated to that spouse's account (Pet. App. 6a). In the court's view, this approach was "inappropriate" in a community property state, because the factual determination of which spouse was the sole proprietor would be more difficult in such a state, where each spouse owns 50% of the business. The court also asserted, without elaboration or citation to supporting evidence, that "[a] strong possibility exists that such a sex-neutral standard would result in practice in an unstated sexually discriminatory presumption" (*id.* at 6a-7a).

In addition, the district court stated that it was "not persuaded" by the Secretary's interpretation of Section 211(a) as limiting self-employment income to that derived from a partnership or sole proprietorship, explaining that the language of Section 211(a) "does not preclude the possibility of a co-proprietorship, where the business does not meet the partnership requirements but nevertheless employed both spouses" (Pet. App. 7a). The court therefore held that the class members "are entitled to an allocation of such co-proprietor income between the spouses' earnings accounts" and that the basis for such an allocation should be the relative amount of labor contributed by each (*ibid.*).*

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* As noted above (see note 4, *supra*), the Social Security Act does not recognize as covered employment an individual's work in a business in which his spouse is the sole proprietor. Under the district court's decision, however, this limitation essentially would be ignored in community property states,

The district court ordered that its new rule for the allocation of self-employment income between spouses in community property states be applied to the earnings accounts of class members retroactively to the inception of the coverage of self-employment in 1950 (Pet. App. 7a-10a). In so ordering, the court rejected the government's contention that, under this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971),[7] the elimination of the presumption in Section 211(a)(5)(A) in favor of husbands should be applied only to income derived after October 1980, the date of the government's acquiescence in the holding in *Becker* that Section 211(a)(5)(A) is unconstitutional (Pet. App. 7a).

In applying the *Chevron Oil* test, the district court observed that the unconstitutionality of Section 211(a)(5)(A) was foreshadowed by a line of sex discrimination cases decided by the Court over the preceding decade (Pet. App. 8a), although it failed to explain why that conclusion warranted retroactive application of the court's new allocation rule back to 1950. Moerover, in weighing the relative equities under *Chevron Oil*, the court recognized as a "serious problem" the possibility that retroactive reallocation of income could reduce some husbands' quarters of coverage so as to make them ineligible for benefits or reduce their income, and that some wives might be better off with their share of their husbands' accounts

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because an individual's work in a business fully managed and controlled by his spouse would be deemed self-employment of a "co-proprietor," and that individual would receive credit for Social Security earnings according to the relative amount of labor he contributed.

[7] See also *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, No. 81-150 (June 28, 1982), slip op. 37-38 (plurality opinion).

than with their own. Rather than declining to order retroactive relief because of these considerations, however, the court simply ordered that no current recipient shall have his benefits reduced as a result of its decision and that wives who would receive greater benefits under the former system could elect to remain under it (Pet. App. 9a-10a). The court also held that its order mandating retroactive relief would not be limited by 42 U.S.C. (& Supp. V) 405(c)(1)(B) and 405(c)(4), which generally restrict to three years, three months, and fifteen days the period within which income entries in the Secretary's records may be corrected (Pet. App. 10a-11a).[8]

3. The Secretary filed a notice of appeal to the court of appeals on March 31, 1982 (Pet. App. 17a). In its Docketing Statement, filed on May 5, 1982, the government stated that it had conceded in district court that Section 211(a)(5)(A) is unconstitutional and that the remaining issues in district court concerned solely the relief to be granted. In the itemization in the Docketing Statement of the issues to be raised on appeal, the government listed only matters concerning relief; there was no mention of the constitutional issue.[9]

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[8] The court's January 22, 1982 opinion, as modified by an order of March 19, 1982, requires that notice of the decision be sent to all female class members residing in community property jurisdictions who were denied benefits after August 20, 1980 (Pet. App. 11a, 14a). Respondent Edwards' individual case was remanded to the Secretary for further proceedings under the standards announced in the court's decision (*id.* at 13a). Final judgment was entered against the Secretary on March 23, 1982 (*id.* at 16a).

[9] The relevant portion of the Docketing Statement provided:

H. Brief Description of Nature of Action and Result Below:

On June 2, 1982, respondents filed a motion to dismiss the government's appeal, contending that the court of appeals did not have jurisdiction under 28 U.S.C. 1291. Section 1291 does not provide for an appeal to the court of appeals "where a direct review may be had in the Supreme Court." See *Donovan* v. *Richland County Association for Retarded Citizens*, 454 U.S. 389, 391 (1982). Respondents argued that the government had a right to take a direct appeal to this Court under 28 U.S.C. 1252, which provides for

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Plaintiffs challenged the constitutionality of 42 U.S.C. 411(a)(5)(A), which requires that where both the husband and wife worked in a family business in a community property State, all of the self-employment income must be allocated to the husband. The government conceded the statute's unconstitutionality, and the remaining issues concerned relief, in particular, the standard to apply in place of the invalid statutory standard. The district court certified a class action, and ordered that the Secretary recompute benefits on the principle that the self-employment income of the business be split between husband and wife on the basis of their relative amounts of labor.

I. Issues to be raised on Appeal:

The issues on appeal may include: (1) whether the district court's standard based on relative amount of labor should be applied rather than the Secretary's standard based on whether there was a true partnership between the spouses; (2) whether it was error to apply the new rule to earnings records dating back to the beginning of the self-employment program; (3) whether it was error to require that no individual lose benefits as a result of the recomputation required under the order; and (4) whether the notice that the court required be sent to potential class members is appropriate.

The Docketing Statement is attached as Exhibit G to Resp. C.A. Br., *supra* note 3.

such an appeal from a judgment or order holding an Act of Congress unconstitutional in a civil action to which the United States or an agency or officer thereof is a party, even though the government sought review only of the district court's decision on non-constitutional issues of relief. Accordingly, they maintained, the Secretary could not take an appeal to the court of appeals to challenge the relief granted by the district court. See Resp. C.A. Br., *supra* note 3, at 4-5, 7-8.

In a one sentence order dated July 27, 1982, the court of appeals granted respondents' motion to dismiss the appeal for lack of jurisdiction, citing only 28 U.S.C. 1252 and *Donovan* v. *Richland County Association for Retarded Citizens*, *supra* (Pet. App. 1a).

SUMMARY OF ARGUMENT

I.

This Court previously has dismissed a direct appeal for lack of jurisdiction under 28 U.S.C. 1252 where the appellant did not challenge the lower court's holding of an Act of Congress unconstitutional and instead sought review only of the district court's ruling on relief. See *Montana Contractors' Association* v. *Kreps*, 442 U.S. 935 (1979). An analysis of the text, legislative history, and purposes of 28 U.S.C. 1252 confirms that the Court's resolution of the jurisdictional issue in *Montana Contractors' Association* was correct and should be followed here and that the court of appeals therefore had jurisdiction of the Secretary's appeal in this case under 28 U.S.C. 1291.

A. The text of 28 U.S.C. 1252 does not warrant a construction that would require appeals raising only nonconstitutional issues to be taken directly to this Court. This is especially so in light of the settled

rule that statutes authorizing appeals to this Court should be construed strictly. See *Perry Education Association* v. *Perry Local Educators Association*, No. 81-896 (Feb. 23, 1983), slip op. 5; *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 581 (1982).

1. The language of the first paragraph of 28 U.S.C. 1252 clearly indicates that the existence of a constitutional issue is a necessary prerequisite for taking a direct appeal. Under that paragraph, an appeal lies "from" a lower court decision "holding any Act of Congress unconstitutional," thereby directly linking the right of appeal with the holding of unconstitutionality. Moreover, because Section 1252 authorizes a direct appeal from an "interlocutory or final" order, an appeal may be taken from an order declaring an Act of Congress unconstitutional even before the district court has had an opportunity to consider questions of relief. If the Court were to affirm the lower court's constitutional ruling in such a case and remand for further proceedings on questions of relief, it could not seriously be contended that a second appeal would have to be taken directly to this Court on those questions, since the constitutional holding would no longer be in issue. The result should be no different in this case, in which the constitutional holding likewise no longer is—and never was—in issue.

In addition, Section 1252 authorizes a direct appeal only in cases in which the United States or an agency or officer thereof is a party, and thus is limited to situations in which the government "will be bound by a holding of unconstitutionality." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). The evident congressional purpose reflected in this language—to provide an expeditious means of removing the binding effect of the constitutional holding on the Executive Branch's administration of the law—would

not be served where, as here, the appeal presents solely questions of relief and this Court would not be asked to overturn the constitutional holding.

2. The structure of 28 U.S.C. 1252 confirms that a direct appeal lies only when the constitutional issue would be presented, because the second paragraph of Section 1252 expressly contemplates that appeals may be taken to courts other than the Supreme Court even in cases in which an Act of Congress has been held unconstitutional. Under the first sentence of the second paragraph, it is only *after* a party has received notice of a direct appeal under the first paragraph that other appeals also must be taken to this Court. And under the second sentence of the second paragraph, all appeals taken to other courts prior to such notice are treated as taken directly to this Court; they are not treated as jurisdictionally defective because they were not taken to this Court in the first instance.

The necessary corollary to these rules is that prior to or in the absence of a notice of direct appeal from a district court decision holding an Act of Congress unconstitutional, certain other appeals may be taken to the courts of appeals pursuant to 28 U.S.C. 1291. It is evident that the basis for distinguishing between the appeals that must be taken directly to this Court under the first paragraph of 28 U.S.C. 1252 and those for which the second paragraph preserves the right of appeal to the courts of appeals under 28 U.S.C. 1291 is whether the appeal itself presents the constitutional issue to which the first paragraph expressly refers.

B. The legislative history of the Act of Aug. 24, 1937, ch. 754, 50 Stat. 751 *et seq.*, from which 28 U.S.C. 1252 is derived, also strongly supports the conclusion that the direct appeal mechanism is avail-

able only when the appellant actually seeks review of the lower court's constitutional holding. The committee reports and floor debates repeatedly discuss the direct appeal mechanism in the context of the constitutionality of an Act of Congress, and these materials reflect an intent to facilitate a prompt determination of such disputed questions. The debates also manifest an understanding that appeals raising other questions would continue to be taken to the courts of appeals.

C. The decisions of this Court make clear that 28 U.S.C. 1252 was intended to facilitate resolution of the constitutional question and thereby to remove a cloud upon the federal government's administration of the law. This purpose would not be served here, because the Secretary has not sought review of the constitutional ruling and thus will be bound by the holding of unconstitutionality irrespective of the outcome of the appeal on issues of relief. In any event, in all of the decisions respondents cite—including *Donovan* v. *Richland County Association for Retarded Citizens*, 454 U.S. 389 (1982), the sole authority relied upon by the court of appeals—the appellant in fact challenged the lower court's constitutional holding. This case is controlled instead by *Montana Contractors' Association* v. *Kreps*, *supra*, in which the Court dismissed an appeal under Section 1252 that sought review only on questions of relief.

II.

If the Court concludes that the court of appeals did not have jurisdiction of the appeal under 28 U.S.C. 1291, the appropriate disposition under this Court's precedents would be to vacate the judgment below and remand to the court of appeals with in-

structions to remand to the district court for entry of a new judgment from which a direct appeal could be taken to this Court under 28 U.S.C. 1252.

ARGUMENT

I. THE COURT OF APPEALS HAD JURISDICTION OVER THE APPEAL UNDER 28 U.S.C. 1291 BECAUSE THE SECRETARY WAS NOT SEEKING REVIEW OF THE DISTRICT COURT'S HOLDING THAT AN ACT OF CONGRESS IS UNCONSTITUTIONAL

Under 28 U.S.C. 1291, the courts of appeals have jurisdiction over "appeals from all final decisions of the district courts * * *, except where a direct review may be had in the Supreme Court." See *Donovan* v. *Richland County Association for Retarded Citizens*, 454 U.S. 389, 391 (1982). The first paragraph of 28 U.S.C. 1252 in turn provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding any Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, * * * is a party." In this case, the court of appeals held that it did not have jurisdiction over the government's appeal under 28 U.S.C. 1291 because a direct review of the district court's final decision could have been had in this Court pursuant to 28 U.S.C. 1252, even though the Secretary did not seek review of the district court's holding that Section 211(a)(5)(A) of the Social Security Act is unconstitutional and challenged only the ruling on relief. This conclusion is directly inconsistent with a prior decision of this Court.

In *Montana Contractors' Association* v. *Kreps*, 442 U.S. 935 (1979), the Court, without dissent, dis-

missed an appeal for lack of jurisdiction under 28 U.S.C. 1252 where the appellants did not seek review of the district court's holding of an Act of Congress unconstitutional and instead sought review only on a nonconstitutional question of relief.[10] The government had moved to dismiss the appeal on the ground that a direct appeal may be taken under the first paragraph of 28 U.S.C. 1252 only if the party seeks review of the lower court's constitutional holding. See Mot. of the Fed. Appellee to Dismiss or Affirm at 6-9 (No. 78-1546, 1978 Term). In response to the government's motion to dismiss, the appellants filed a Reply Brief, in which they contended (at 2-3), as respondents do here (Br. in Opp. 2, 7), that this Court had jurisdiction under 28 U.S.C. 1252 over the issue of relief solely by virtue of the fact that the district court had held an Act of Congress unconstitutional, even though they did not seek review of the constitutional holding. The jurisdictional issue accordingly was joined in *Montana Contractors'*

[10] The district court had held unconstitutional 42 U.S.C. (Supp. V) 6705(f), the minority business enterprise provision that subsequently was upheld by this Court in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). See *Montana Contractors' Association* v. *Secretary of Commerce*, 460 F. Supp. 1174 (D. Mont. 1978), appeal dismissed, 442 U.S. 935 (1979). Although the plaintiffs had sought an injunction against enforcement of the provision with respect to several projects, the district court enjoined enforcement only with respect to the sole remaining project for which a contract had not been let. The government did not take an appeal from that decision. The plaintiffs, however, took a direct appeal to this Court pursuant to 28 U.S.C. 1252, contending that the district court erred in not awarding damages to them against the federal and local officials responsible for administering the statutory provision that the district court had held unconstitutional. J.S. at 4, 9-13, 12a (No. 78-1546, 1978 Term).

Association, and the dismissal of the appeal in that case therefore must be viewed as a holding by this Court that a direct appeal does not lie under 28 U.S.C. 1252 in such circumstances.

Because *Montana Contractors' Association* did not fall within the exception from the general grant of appellate jurisdiction to the courts of appeals under 28 U.S.C. 1291 for cases "where a direct review may be had in the Supreme Court," the necessary corrollary to the Court's dismissal of the appeal in *Montana Contractors' Association* is that an appeal from the district court's ruling on relief in that case *did* lie to the court of appeals under 28 U.S.C. 1291. It follows that the court of appeals likewise had jurisdiction over the Secretary's appeal in the instant case. This conclusion also is consistent with a recent decision of the United States Court of Appeals for the Seventh Circuit holding that an appeal was properly taken to that court under 28 U.S.C. 1291, rather than to this Court under 28 U.S.C. 1252, in a case in which the government did not challenge the district court's holding of an Act of Congress unconstitutional and challenged only the district court's ruling on relief. *Denberg* v. *United States Railroad Retirement Board*, No. 81-2386 (7th Cir. May 10, 1983) (order on petition for rehearing, amending the opinion reported at 696 F.2d 1193 (1983)); see pages 36-41, *infra*.

As we explain below, a consideration of the text, legislative history, and purposes of 28 U.S.C. 1252 strongly reinforces the soundness of the disposition of the appeals in *Montana Contractors' Association* and *Denberg*, and thus further demonstrates that the court below erred in dismissing the Secretary's appeal under 28 U.S.C. 1291.

A. The Language And Structure Of 28 U.S.C. 1252 Establish That A Direct Appeal To This Court Does Not Lie If The Appellant Does Not Seek Review Of The Lower Court's Holding That A Federal Statute Is Unconstitutional

"As with any issue of statutory construction, we 'must begin with the language of the statute itself.'" *Bowsher* v. *Merck & Co.*, No. 81-1273 (Apr. 19, 1983), slip op. 5-6 (footnote omitted), quoting *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 580 (1982), and *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 187 (1980). Moreover, in another case involving a jurisdictional statute authorizing an appeal to this Court in cases presenting questions of the constitutionality of an Act of Congress, the Court recently stressed that

> when the statute to be construed creates * * * a class of cases that command the immediate attention of this Court * * *, close construction of statutory language takes on added importance. As we have said: "Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes'; and we are particularly prone to accord 'strict construction of statutes authorizing appeals' to this Court." *Palmore* v. *United States*, 411 U.S. 389, 396 (1973) (citations omitted).

Bread Political Action Committee v. *FEC*, *supra*, 455 U.S. at 580-581. See also *Perry Education Association* v. *Perry Local Educators' Association*, No. 81-896 (Feb. 23, 1983), slip op. 5.

To be sure, this Court has observed that in enacting 28 U.S.C. 1252, Congress "unambiguously mandated" an exception—applicable "in the narrow circumstances that the section identifies"—to the overriding policy of minimizing the mandatory docket of

this Court.[11] *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975).[12] As the text and structure of Section 1252 make clear, the "narrow circumstances that the section identifies" are those in which the appellant actually seeks review of the holding of a lower federal court that an Act of Congress is unconstitutional. This Court, of course, must give full effect to Congress's provision for direct review in those circumstances. But the obvious fact that Congress wanted this class of cases to be speedily resolved "scarcely implies that Congress intended the courts to augment Congress'[s] enumeration" (*Bread Political Action Committee* v. *FEC*, *supra*, 455 U.S. at 583) by also requiring that a direct appeal be taken in other cases in which this Court would not be asked to consider the question of the constitutionality of an Act of Congress, for which the direct appeal mechanism was designed.

1. The language of the first paragraph of 28 U.S.C. 1252 itself indicates that a challenge to the lower court's constitutional ruling is necessary to support a direct appeal to this Court. Under that paragraph, a direct appeal lies "from" a judgment, decree, or order "holding any Act of Congress uncon-

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[11] See *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974).

[12] Accordingly, the Court held in *McLucas* v. *DeChamplain* that it had jurisdiction under 28 U.S.C. 1252 over an appeal challenging the district court's holding of an Act of Congress unconstitutional, even though the single-judge district court did not have jurisdiction over the case under 28 U.S.C. (1970 ed.) 2282. Although under established precedent the failure to convene a three-judge district court as required by 28 U.S.C. (1970 ed.) 2282 would have barred a direct appeal to this Court under 28 U.S.C. 1253, the Court declined to read into 28 U.S.C. 1252 the limitations on direct appeal contained in 28 U.S.C. 1253. 421 U.S. at 29-31.

stitutional," thereby directly linking the right of appeal with the holding of unconstitutionality. In the instant case, the Secretary has not appealed from the district court's holding of unconstitutionality, and that holding will be unaffected even if the government prevails on its appeal of the relief ordered by the district court. The first paragraph of Section 1252 does not suggest that Congress intended to bring such an appeal under a procedure that manifestly was intended for resolution of constitutional issues.

In addition, because a direct appeal lies under 28 U.S.C. 1252 whether the order appealed from is "interlocutory or final," a direct appeal may be taken to this Court from an order declaring a statute unconstitutional that was issued before the district court even had an opportunity to consider questions of relief. If the Court were to affirm such an interlocutory order striking down a federal statute and remand to the district court for further proceedings only on questions of relief, it could not seriously be contended that a direct appeal again must be taken to this Court under 28 U.S.C. 1252 simply to challenge the district court's order granting relief. The congressional purpose of providing a prompt resolution of the constitutional issue already would have been served on the previous direct appeal, and it would be pointless to crowd this Court's mandatory docket with an appeal raising only subsidiary issues. Cf. *Denberg* v. *United States Railroad Retirement Board*, *supra*; see pages 37-38, *infra*. Thus, it seems plain that Congress did not intend this Court to review questions of relief in the first instance in *every* case in which an Act of Congress has been held unconstitutional, including those cases in which the constitutional holding itself no longer is in issue because a prior decision of this Court has disposed of the matter. The result should be no different in the

instant case, where the district court's constitutional holding likewise no longer is—and never was—in issue.

It is significant as well that the first paragraph of 28 U.S.C. 1252 authorizes a direct appeal to this Court from a lower court's holding of an Act of Congress unconstitutional only in civil actions "to which the United States or any of its agencies, or any officer or employee thereof, * * * is a party"; no direct appeal lies to review a lower court's constitutional holding if there are only non-federal parties to the suit.[13] As this Court has observed, the quoted language serves to furnish a right of direct appeal where the government has participated in the litigation "and thus will be bound by a holding of unconstitutionality." *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31. The language of Section 1252 therefore reveals a congressional purpose to assure an expeditious means of removing the restraint on the federal government's administration of the law when it would be bound by a holding that the law in question is unconstitutional, either on its face or as applied.[14] That statutory purpose would not be furthered by requiring that a direct appeal be taken in this case: because the government's concession in district court that Section 211(a)(5)(A) is unconstitu-

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[13] Of course, where the United States or an agency or officer thereof is a party to the suit, a direct appeal may be taken to this Court by "any party," not only by the government. See, *e.g.*, *United States* v. *Bekins*, 304 U.S. 27 (1938).

[14] 28 U.S.C. 1252 authorizes a direct appeal whether the Act of Congress has been held unconstitutional on its face or as applied. *California* v. *Grace Brethren Church*, No. 81-31 (June 18, 1982), slip op. 11; *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981); *Fleming* v. *Rhodes*, 331 U.S. 100, 102-103 (1947).

tional and the resulting decision not to raise this issue on appeal obviously were intended to bind the Secretary in her nationwide administration of the Social Security Act, there was no need to resort to the special statutory review procedure in 28 U.S.C. 1252 in an effort to remove the binding effect of the district court's holding reaching the same conclusion.[15]

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[15] The language of Section 2 of the Act of Aug. 24, 1937, ch. 754, 50 Stat. 752, from which 28 U.S.C. 1252 is derived (see *California* v. *Grace Brethren Church*, *supra*, slip op. 11), does not suggest a different result. Section 2 provided in pertinent part:

> In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit or proceeding upon application therefor or notice thereof within thirty days after the entry of a final or interlocutory judgment, decree, or order; * * *.

The language providing for a direct appeal where "the decision" is against the constitutionality of a federal statute indicates that this is the only "decision" from which such an appeal lies. A direct appeal may not be taken to review the lower court's decision on other issues, although if a direct appeal is taken to review the constitutional holding, the appeal brings the whole case before the Court and other aspects of the case may be reviewed as well. See, *e.g.*, *Williams* v. *Zbaraz*, 448 U.S. 358, 368 n.10 (1980).

The codification of Section 2 at 28 U.S.C. 1252 resulted in a number of changes in phraseology, but the language of the provision as originally enacted is of some assistance in interpreting the scope of the present provision. See 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4037, at 50 (1978).

2. The interpretation we urge is supported not only by the language of the first paragraph of 28 U.S.C. 1252, but by the "structure of the Act" as well. *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs*, No. 81-1891 (May 24, 1983), slip op. 9; *FBI* v. *Abramson*, 456 U.S. 615, 625 (1982); *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 211 (1979). Although it is the first paragraph of Section 1252 that actually grants the right of direct appeal, the second paragraph of that Section confirms that not all appeals in a case in which an Act of Congress has been held unconstitutional must be taken directly to this Court pursuant to the first paragraph. The second paragraph of Section 1252 provides:

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

The first sentence of this paragraph establishes that it is only *after* a party has filed a notice of direct appeal pursuant to the first paragraph of Section 1252 that all appeals or cross appeals in a case in which an Act of Congress has been held unconstitutional must be taken to this Court. The necessary corollary to this rule is that prior to or in the absence of such notice, as here, certain other appeals in the case may be taken to the court of appeals.

The second sentence of the second paragraph of 28 U.S.C. 1252 provides that all appeals taken to "other courts" prior to the filing of the notice of appeal to this Court pursuant to the first paragraph of Section

1252 "shall be treated as taken directly to the Supreme Court"; such appeals to other courts therefore are not regarded as jurisdictionally defective because they were not taken directly to this Court in the first instance. It necessarily follows that if a notice of appeal to this Court pursuant to the first paragraph of Section 1252 is not filed, appeals taken to "other courts"—in this case, to the court of appeals—likewise are not, for that reason, jurisdictionally defective. Cf. 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4037, at 53 (1978).

Thus, 28 U.S.C. 1252, read as a whole, divides appeals in cases in which a district court has held an Act of Congress unconstitutional into two categories: those that must be taken directly to this Court under the first paragraph, and those for which the second paragraph makes clear that the generally applicable right of appeal to the court of appeals pursuant to 28 U.S.C. 1291 is preserved. Reading 28 U.S.C. 1252 " 'with precision and fidelity to the terms by which Congress has expressed its wishes' " (*Bread Political Action Committee* v. *FEC*, *supra*, 455 U.S. at 580; citation omitted), it is evident that the basis for distinguishing between the two categories is whether the appeal itself presents the question of the constitutionality of an Act of Congress to which the first paragraph explicitly refers.[16] Limiting the right of direct

[16] This Court's jurisdiction under 28 U.S.C. 1252 therefore depends not on whether the constitutional question was contested in the court that held the Act of Congress unconstitutional, but rather on whether this Court would be asked to review the constitutional holding. See note 26, *infra*; see also Reply Br. for the Appellant in response to the Mot. to Dismiss at 3-10, *INS* v. *Chadha* (No. 80-1832, 1980 Term). Such cases would include those in which the appellant challenges the district court's interpretation of the Act of Con-

appeal to these "narrow circumstances that the section identifies" (*McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31) also is consistent with the principle of according strict construction of statutes authorizing appeals to this Court (*Bread Political Action Committee* v. *FEC*, *supra*, 455 U.S. at 581).

When a direct appeal is taken to this Court, the Court of course has jurisdiction to decide " 'not only the constitutional question, but the whole case' " (*Williams* v. *Zbaraz*, 448 U.S. 358, 368 n.10 (1980), quoting *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31), including nonconstitutional questions such as those concerning the relief to be granted if the holding of unconstitutionality is affirmed.[17] But when the appellant does not seek review of the holding of unconstitutionality, a direct appeal does not lie to this Court under 28 U.S.C. 1252 on any issue.[18] An appeal from

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gress that in turn led the court to hold the Act unconstitutional. See, *e.g.*, *Donovan* v. *Blitz*, vacated as moot, No. 82-611 (Jan. 10, 1983). In such a case, if this Court were to adopt the appellant's statutory construction, it would set aside the holding of unconstitutionality. See *United States* v. *Raines*, 362 U.S. 17, 20 (1960).

[17] The provision in the second paragraph of Section 1252 for all other appeals and cross-appeals to be taken to this Court when a direct appeal has been taken under the first paragraph ensures that there will not be duplicative proceedings in the court of appeals and this Court on these nonconstitutional questions. See R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978).

[18] The conclusion that an appeal lies under the first paragraph of 28 U.S.C. 1252 only when the appellant seeks review of the lower court's holding that an Act of Congress is unconstitutional is supported not only by the structure of Section 1252 itself, but also by the structure of Chapter 81 of Title 28 of the United States Code with respect to this

nonconstitutional aspects of the district court's decision therefore must pursue the normal route—to the court of appeals pursuant to 28 U.S.C. 1291. Cf. R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978).

Court's appellate jurisdiction generally. In 28 U.S.C. 1257(1) and (2), Congress has provided a right of appeal from the decision of the highest court of a state holding a federal statute unconstitutional or holding a state statute constitutional. Section 1257 long has been understood to confer appellate jurisdiction only over the specified constitutional issue decided by the state court. Other federal issues involved in the case may be raised only under the Court's certiorari jurisdiction. See, *e.g.*, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476, 487 n.14 (1975); *DeBacker* v. *Brainard*, 396 U.S. 28, 32 (1969); *Mishkin* v. *New York*, 383 U.S. 502, 512 (1966); *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1944); *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 547 (1922); see also *Doe* v. *Delaware*, 450 U.S. 382, 385 n.5 (1981) (Brennan, J., dissenting). See generally R. Stern & E. Gressman, *supra*, § 3.6, at 169-172.

Similarly, 28 U.S.C. 1254(2), which permits an appeal by a party "relying on a State statute" held unconstitutional by a federal court of appeals, expressly provides that "review on appeal shall be restricted to the Federal questions presented." This provision has been understood to mean that questions concerning the constitutionality of the state statute must be at least among, if not the only, "Federal questions presented." R. Stern & E. Gressman, *supra*, § 2.7, at 68-69; 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 435.01[2], at 6-55 to 6-56 (1982 ed.); cf. *City of New Orleans* v. *Dukes*, 427 U.S. 297, 302 (1976). See also 2 U.S.C. 437h(b) (limiting appeal to this Court to cases under the Federal Election Campaign Act of 1971 in which a constitutional issue is raised); *Pothier* v. *Rodman*, 261 U.S. 307, 311-312 (1923) (construing the direct appeal provision of Section 2 of the Act of Jan. 28, 1915, ch. 22, 38 Stat. 804).

There is no reason to believe that Congress intended to depart from this pattern in 28 U.S.C. 1252.

B. The Legislative History Of 28 U.S.C. 1252 Supports The Conclusion That A Direct Appeal Is Available Only If The Appellant Seeks Review Of The Lower Court's Constitutional Holding

The legislative history of 28 U.S.C. 1252 strongly supports the conclusion that the direct appeal mechanism is available only when the constitutional holding will be subject to review and possible reversal on appeal. The direct appeal provision in 28 U.S.C. 1252 was first enacted as Section 2 of the Act of Aug. 24, 1937, ch. 754, 50 Stat. 752. The House, Senate and Conference Reports on that measure all described the bill as one providing, in pertinent part, for "appeal by the United States in certain cases in which the constitutionality of acts of Congress is involved" (H.R. Rep. No. 212, 75th Cong., 1st Sess. 1 (1937); S. Rep. No. 963, 75th Cong., 1st Sess. 1 (1937); H.R. Conf. Rep. No. 1490, 75th Cong., 1st Sess. 5 (1937)). In addition, the House Report explained that the purpose of the provision was to ensure a "prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress" (H.R. Rep. No. 212, *supra*, at 2). The Senate Report similarly refers to the power of the Attorney General "to take a question of constitutionality to the Supreme Court" (S. Rep. No. 963, *supra*, at 2). In this case, no "question"—much less a "disputed question[]"—of the constitutionality of an Act of Congress is "involved" in the Secretary's appeal or will be submitted for a "determination" by the appellate court; the government has conceded the unconstitutionality of Section 211(a)(5)(A) of the Social Security Act and seeks review only of other issues.

The floor debates also demonstrate that the direct appeal mechanism was intended for resolution of the central constitutional question. Thus, Representative

Sumners, Chairman of the House Judiciary Committee and sponsor of the bill, explained that the Attorney General should be granted "the right to appeal directly to the Supreme Court from an adverse decision on the question of constitutionality" (81 Cong. Rec. 3254 (1937)) "in order to expedite the determination of the constitutional question" (*id.* at 3272).[19] This, he explained, would "shut[] off a long period of suspense for the litigants in other cases" if the "determination is against the constitutionality of the act" (*id.* at 3256). Similarly, Representative Chandler explained that passage of the measure was necessary because, although Congress had enacted numerous laws, it had "not expedited the determination of their constitutionality when the lower courts declare them invalid" (*id.* at 3273).

Representative Sumners was asked whether, when the Attorney General intervened in a suit between private parties involving the constitutionality of an Act of Congress and took an appeal directly to the Supreme Court following the district court's holding of unconstitutionality, "this [would] take the entire case directly to the Supreme Court * * * or just the question of constitutionality?" 81 Cong. Rec. 3260 (1937) (remarks of Rep. McFarlane). Representative Sumners did not respond directly to this question, although the Court of course has since held that a direct appeal brings up the "whole case." See,

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[19] See also 81 Cong. Rec. 3261 (1937) (remarks of Rep. Sumners; emphasis added):

> When the *question of the constitutionality of an act of Congress* is raised, and it is a serious question, it is the judgment of the members of the committee that *that question* ought to be presented to the Supreme Court just as quickly as it can be carried there properly.

e.g., *Williams* v. *Zbaraz*, *supra*, 448 U.S. at 368. But Representative Sumners did stress in his answer that the case "would come up on the question of constitutionality." 81 Cong. Rec. 3260 (1937).

Another Member inquired further regarding the other issues that could be involved in the case (81 Cong. Rec. 3261 (1937) (remarks of Rep. Dowell)):

> Assuming that litigants have other questions involved and that on the other questions an appeal is taken from the district court. Assume further the Attorney General intervenes on a constitutional question. How would the litigant proceed in the court of appeals so far as their appeal is concerned?

Representative Sumners remarked that he did not know what arrangement would be made for cases in which separate appeals were taken to the court of appeals and the Supreme Court (*id.* at 3261), perhaps because the Committee's recommended bill did not contain a provision similar to that now embodied in the second paragraph of 28 U.S.C. 1252 (see 81 Cong. Rec. 3269 (1937)). The bill passed by the Senate responded to this concern through its provision (contained in Section 2 of the bill as enacted and now incorporated in the second paragraph of Section 1252) for other appeals in the case to be taken to this Court as well, but *only* if a direct appeal first has been taken to this Court under what is now the first paragraph of Section 1252. See S. Rep. No. 963, *supra*, at 4; 81 Cong. Rec. 8514 (1937).[20] Thus, where, as here, a

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[20] The House bill provided for direct appeal only by the Attorney General, not by other parties to the case. 81 Cong. Rec. 3269-3270, 3272-3273 (1937). It thus was clear that under the House bill, appeals by other parties on nonconstitutional questions (as well as the constitutional issue) would

direct appeal has not been taken to this Court from the district court's holding of unconstitutionality, the right of appeal to the court of appeals on what Representative Dowell referred to as "other questions" (81 Cong. Rec. 3261 (1937)) was preserved.

The legislative history therefore leaves no doubt that Congress enacted 28 U.S.C. 1252 for the purpose of making a direct appeal available in those situations in which the question of the constitutionality of an Act of Congress would actually be presented to this Court. The legislative history likewise confirms what the second paragraph of 28 U.S.C. 1252 itself clearly indicates: Congress intended that appeals raising only other issues would continue to be taken to the court of appeals.

C. The Court Of Appeals' Dismissal Of The Appeal Is Not Supported By Decisions Of This Court Or The Courts Of Appeals

1. The opinions of this Court construing 28 U.S.C. 1252 offer no support for the decision of the court of appeals in this case. Those opinions make clear, as we have said (see page 21, *supra*), that the purpose

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have been taken to the court of appeals. The Senate bill, and the law as enacted, made the right of direct appeal available to any party, not merely the federal government, yet at the same time incorporated the provision now contained in the second paragraph of 28 U.S.C. 1252, which expressly contemplates that certain appeals in cases in which an Act of Congress has been held unconstitutional will continue to be taken to the court of appeals. S. Rep. No. 963, *supra*, at 4; 81 Cong. Rec. 8514 (1937). The simultaneous adoption of these changes reinforces the conclusion that Congress deliberately preserved the right of appeal to the court of appeals when only nonconstitutional issues will be presented on appeal. See *Lehman* v. *Nakshian*, 453 U.S. 156, 167-168 (1981).

of Section 1252 is " 'to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality.' " *California* v. *Grace Brethren Church*, *supra*, slip op. 11, quoting *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31; see also *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*, 454 U.S. at 390-391 & n.3. Because, in these circumstances, the Executive will be required to adhere to the holding of unconstitutionality and to disregard the contrary provisions of a duly enacted law, Congress determined that a proper regard for the role of the Legislative Branch and the need to remove a cloud from the administration of the statute in question warrant a prompt and definitive resolution of the constitutional question by the only Court capable of providing it. *McLucas* v. *DeChamplain*, *supra*; *Fleming* v. *Rhodes*, 331 U.S. 100, 104 & n.6 (1947); *Reid* v. *Covert*, 351 U.S. 487, 490 (1956), vacated on other grounds, 354 U.S. 1 (1957); 81 Cong. Rec. 3254-3255, 3268-3269 (1937) (remarks of Rep. Sumners).

These policies simply have no application in a case such as this. Where the government does not seek review of the lower court's constitutional holding, immediate review in this Court on subsidiary questions of relief would not remove the binding effect of the lower court's constitutional ruling and thus would not further the congressional purpose underlying the availability of immediate review. That conclusion is especially apparent here, because the government has conceded the unconstitutionality of Section 211(a)(5)(A) of the Social Security Act in a nationwide class action in which the judgment will bind the Secretary on the constitutional issue in the nationwide administration of the law. Moreover, the Attorney

General formally adopted this position because the unconstitutionality of the statutory provision was dictated by prior decisions of this Court. Thus, this Court, in effect, already has performed the function that Congress intended by the enactment of 28 U.S.C. 1252 by rendering an authoritative decision that resolves the question of the constitutionality of the statutory provision at issue. It would be pointless to construe Section 1252 to preclude the Secretary from foregoing the right of direct appeal in these circumstances and from raising only unresolved issues of relief in the court of appeals. Such a requirement needlessly would add a new category of cases to this Court's mandatory appellate docket at a time when the burden on this Court is increasing in other respects. See *Bread Political Action Committee* v. *FEC*, *supra*, 455 U.S. at 580-581.

The only authority the court of appeals cited in its order dismissing the appeal was this Court's decision in *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*. See Pet. App. 1a. But that decision obviously has no application here. There, the Secretary of Labor *did* challenge the district court's holding that the Fair Labor Standards Act was unconstitutional as applied to a particular employer, and the Secretary's appeal seeking review of this constitutional holding therefore unquestionably had to be taken to this Court. *Richland County* does not suggest that an appeal that does not present the constitutional question must be brought directly to this Court as well.

2. In all of the cases cited by respondents in their Brief in Opposition, the party who invoked this Court's jurisdiction under 28 U.S.C. 1252 likewise sought review of the lower court's constitutional hold-

ing. See *California* v. *Grace Brethren Church*, *supra*, slip op. 1, 10-13, 24-25; *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*; *Williams* v. *Zbaraz*, *supra*, 448 U.S. at 366;[21] *United States* v. *Clark*, 445 U.S. 23, 25-27 n.2 (1980);[22] *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31;[23] *United States* v. *Raines*, 362 U.S. 17, 20 (1960); *Fleming* v. *Rhodes*, 331 U.S. 100, 102-104, 106-107 (1947). None of these decisions addresses the quite different question involved in this case. *Montana Contractors' Association* v. *Kreps*, *supra*, does address that question and holds that an appeal does not lie under Section 1252 if the appellant does not seek to overturn the constitutional adjudication and instead seeks review only on questions of relief.[24]

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[21] See J.S. 7 (No. 79-4, 1979 Term); J.S. 6, 16 (No. 79-5, 1979 Term); J.S. 2 (No. 79-491, 1979 Term).

[22] See J.S. 2 (No. 78-1513, 1978 Term).

[23] See J.S. 2 (No. 78-1846, 1973 Term).

[24] In *Regan* v. *Taxation With Representation of Washington*, Nos. 81-2338 and 82-134 (May 23, 1983), the Secretary of the Treasury took a direct appeal (No. 81-2338) under 28 U.S.C. 1252 from the court of appeals' decision holding 26 U.S.C. 501(c)(3) unconstitutional under the Fifth Amendment, and the appellee filed a cross-appeal (No. 82-134) under 28 U.S.C. 1252 seeking review of the court of appeals' rejection of its argument that 26 U.S.C. 501(c)(3) also was unconstitutional under the First Amendment. The Court, without discussion, stated that the "language [of the first paragraph of 28 U.S.C. 1252] is broad enough to encompass appellee's cross-appeal" and denied the government's motion to dismiss the appeal. *Regan* v. *Taxation With Representation*, *supra*, slip op. 2-3 n.3.

Regan v. *Taxation With Representation* expressly holds only that a *cross*-appeal that does not seek review of the lower court's holding of an Act of Congress unconstitutional may

Respondents nevertheless contend (Br. in Opp. 4) that this Court's decision in *United States* v. *Clark*, *supra*, supports their position. This contention is plainly wrong. In *Clark*, the appellee argued that an appeal did not lie under 28 U.S.C. 1252 because the Court of Claims did not actually hold an Act of Congress unconstitutional—one of the explicit threshold requirements for taking an appeal under Section 1252. Instead, it was argued, the government had conceded that a prior decision of the Court of Claims holding the same statute unconstitutional was dispositive, and the prior decision therefore was the one in which the statute was held unconstitutional.[28] This Court concluded, however, that a determination that the statutory provision was unconstitutional "was a necessary predicate to the relief" granted to the appellee's children and that "this determination of unconstitutionality may be appealed under § 1252" (445 U.S. at 26 n.2), even though the Court of Claims had reached its conclusion by relying on its earlier ruling (*ibid.*). Thus, although the government had conceded in *Clark* that the case was controlled in the Court of Claims by a prior decision of that court, the government did not

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be brought under the first paragraph of Section 1252. (If jurisdiction rests under 28 U.S.C. 1252 for a cross-appeal such as that involved in *Regan* v. *Taxation With Representation*, it would, in our view, appear to be pursuant to the second paragraph of Section 1252, which expressly addresses the question of cross-appeals.) Moreover, the particular cross-appeal at issue raised an alternative ground for holding the statute unconstitutional and therefore was closely intertwined with the direct appeal. This case, in contrast, concerns jurisdiction over a direct appeal, not a cross-appeal, and it raises no issue concerning the constitutionality of a federal statute.

[28] Mot. to Aff. 13 (No. 78-1513, 1978 Term).

concede that the statute was unconstitutional; to the contrary, it sought review of the constitutional holding in this Court. In the instant case, unlike in *Clark*, it is not the "determination of unconstitutionality" that the Secretary seeks to have reviewed (445 U.S. at 26 n.2), but other matters.[26]

Respondents' reliance (Br. in Opp. 3) on *California* v. *Grace Brethren Church*, *supra*, is misplaced for the same reason. Quoting a phrase from the opinion in that case out of context, respondents contend that so long as the "determination that a statutory provision was unconstitutional 'was a necessary predicate to the relief' " (slip op. 11, quoting *United States* v. *Clark*, *supra*, 445 U.S. at 26 n.2), a direct appeal lies to this Court under 28 U.S.C. 1252. As explained below, however, the question involved in *Grace Brethren Church*, like that in *Clark*, was whether the district court had actually decided the question of the constitutionality of an Act of Congress so that the appellants could in turn take a direct appeal for the purpose of presenting that same question to this Court.

Although the district court in *Grace Brethren Church* did not expressly hold the provision of the Federal Unemployment Tax Act, 26 U.S.C. (& Supp. V) 3301 *et seq.* (FUTA), unconstitutional (*Grace*

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[26] Respondents contend (Br. in Opp. 4) that *Clark* is similar to this case because there, as here, the only issues considered by the lower court related to relief. The relevant inquiry for purposes of 28 U.S.C. 1252, however, is not what issues the lower court actively "considered" (rather than regarded as conceded by a party or foreclosed by prior decisions), but whether the lower court's decision necessarily was predicated on a determination that an Act of Congress was unconstitutional *and* whether this Court would be asked to pass on that determination. If so, as in *Clark*, a direct appeal lies; if not, as here, a direct appeal does not lie.

Brethren Church, supra, slip op. 11), it did hold the closely related state statute unconstitutional and enjoined the state officials from collecting taxes under it (*id.* at 8). This Court concluded that the district court's holding that the state statute was unconstitutional was based solely on the court's understanding of the FUTA (*Grace Brethren Church, supra*, slip op. 9-11). Accordingly, the Court held, in the passage quoted above and by respondents, that a determination that the FUTA was unconstitutional "was a necessary predicate to the relief" granted against the state officials and that an Act of Congress therefore had been held unconstitutional for purposes of 28 U.S.C. 1252. For this reason, the state and federal officials were free to take a direct appeal to challenge this constitutional holding. The Court did not suggest that a direct appeal would have been available if the state and federal officials had acquiesced in and therefore had not sought review of the district court's constitutional holding and the state officials had appealed only the relief ordered by the district court, as the Secretary did here.

3. The conclusion that the court of appeals had jurisdiction over the Secretary's appeal in this case also is supported by a recent decision of the Seventh Circuit. In *Denberg* v. *United States Railroad Retirement Board*, No. 81-2386 (May 10, 1983) (order on rehearing amending the opinion reported at 696 F.2d 1193), that court held that a direct appeal did not lie under 28 U.S.C. 1252 in a case in which the government did not seek review of the lower court's holding that a federal statute was unconstitutional.

Denberg was a class-action challenge to a provision of the Railroad Retirement Act, 45 U.S.C. 231a(c)(3)(ii), which provides that a husband is eligible for spouse's benefits only if he was receiving at least one-

half of his support from his wife at the time she began to receive benefits. After this Court held a parallel provision of the Social Security Act unconstitutional in *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), the Court summarily affirmed a decision holding 45 U.S.C. 231a(c)(3)(ii) unconstitutional. See *Railroad Retirement Board* v. *Kalina*, 431 U.S. 909 (1977), aff'g 541 F.2d 1204 (6th Cir. 1976). In light of *Kalina*, the government conceded in district court in *Denberg* that 45 U.S.C. 231a(c)(3)(ii) was unconstitutional. *Denberg* v. *United States Railroad Retirement Board*, No. 76 C 864 (E.D. Ill. June 8, 1981), slip op. 2; see also 696 F.2d at 1194. The only remaining question concerned the scope of relief. The district court granted retroactive relief to all class members, entitling them to recover even for periods prior to this Court's decision in *Goldfarb*, and the government appealed this ruling on relief to the court of appeals pursuant to 28 U.S.C. 1291.

The court of appeals did not address the question of its jurisdiction over the appeal in its initial opinion.[27] But in an order entered on petition for rehearing, the court added a paragraph to its original opinion, stating (Order, *supra*, at 2):

> Since the statute was held unconstitutional by the Supreme Court in *Kalina* before the district court entered its judgment from which the government has appealed, section 1252 of the Judicial Code, which read in light of section 1291

[27] The court of appeals held that the district court did not have subject matter jurisdiction over the case under 28 U.S.C. 1337 because the plaintiff should have sought judicial review of the denial of benefits in the court of appeals, as required by 45 U.S.C. 231g and 355(f). It therefore ordered that the case be dismissed without reaching the merits. 696 F.2d at 1195-1198.

> gives the Supreme Court exclusive jurisdiction over appeals from any federal district court order holding an Act of Congress unconstitutional in a suit to which the federal agency is a party, is inapplicable. The judgment appealed from was not a judgment holding a statute unconstitutional—the statute had already been held unconstitutional by the Supreme Court in another case—but a judgment concerning the remedial consequences of the statute's unconstitutionality. Once the unconstitutionality of a statute has been authoritatively determined by the Supreme Court, there is no purpose in allowing an expedited appeal to the Court from a subsequent district court judgment merely premised on that determination.

The Seventh Circuit correctly concluded that it had jurisdiction under 28 U.S.C. 1291 over the appeal raising only nonconstitutional issues of relief, but its analysis was flawed. The test for determining whether a direct appeal may be taken under 28 U.S.C. 1252 is not whether this Court previously has decided the precise constitutional question arising under the same statute. This Court had not previously held unconstitutional the particular statute involved in *Montana Contractors' Association* v. *Kreps*, *supra*, when the appeal in that case was taken to this Court,[28] but the Court nevertheless dismissed the appeal.

Moreover, contrary to the view of the Seventh Circuit in *Denberg*, the district court in that case plainly *did* hold an Act of Congress unconstitutional for purposes of 28 U.S.C. 1252, because "a determination that [the] statutory provision was unconstitutional

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[28] To the contrary, this Court subsequently sustained the constitutionality of that statute in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

'was a necessary predicate to the relief' that the lower court granted" in the form of retroactive benefits to class members. See *California* v. *Grace Brethren Church*, *supra*, slip op. 11, quoting *United States* v. *Clark*, *supra*, 445 U.S. at 26 n.2. To be sure, the district court's predicate determination of unconstitutionality was dictated by this Court's summary affirmance in *Kalina*. But the fact that the district court simply applied what it perceived to be controlling precedent to the case before it does not mean that it thereby failed to hold an Act of Congress unconstitutional; as we have said, the relief ordered by the district court necessarily was based on a conclusion that the statute was unconstitutional.

Furthermore, a lower court's decision on a constitutional question almost always will be based at least to some extent on prior decisions of this Court. Occasionally, as in *Denberg*, one of this Court's decisions will be precisely on point because it disposed of the same constitutional question arising under the same statute that is challenged in the lower court. In other instances, a different statutory provision might have been involved in the prior decision of this Court, but the Court's reasoning nevertheless will be deemed by the lower court as controlling. In still other instances, this Court's prior decisions will be relied upon only for their inferential support. The existence of appellate jurisdiction under 28 U.S.C. 1252 cannot be made to turn on difficult judgments regarding the degree to which the lower court's predicate determination of unconstitutionality was dictated by precedent.[29]

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[29] For example, after this Court rendered its decision in *Califano* v. *Goldfarb*, the Court, in *Kalina*, summarily affirmed a court of appeals decision holding the parallel provision of the Railroad Retirement Act unconstitutional. Al-

The Court's decision in *United States* v. *Clark*, *supra*, strongly supports this conclusion. There, the Court rejected the contention that a direct appeal did not lie under 28 U.S.C. 1252 because the Court of Claims had based its holding that the statutory provision involved was unconstitutional on a prior decision of that court reaching the same result. The Court explained that "[a]n appeal under § 1252 lies for any federal-court decision declaring an Act of Congress unconstitutional in a civil action in which the United States is a party, not just for the first such decision." 445 U.S. at 26-27 n.2. The result should be no different where, as in *Denberg*, the precedent that was deemed controlling by the lower court was a decision of this Court. Thus, the court of appeals rather than this Court had jurisdiction over the appeal in *Denberg* not because the district court had failed to hold the statute unconstitutional—it clearly so held—but because the government was not challenging that predicate determination of unconstitutionality and in-

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though different statutory provisions were involved in the two cases, those provisions were indistinguishable for purposes of constitutional analysis. If this Court had not decided *Kalina*, the district courts' decision in *Denberg* regarding the same provision of the Railroad Retirement Act would have been equally controlled by this Court's decision in *Goldfarb*. It is unclear whether the Seventh Circuit's suggested analysis in *Denberg* would require that an appeal seeking review only of the district court's ruling on relief be taken to this Court under 28 U.S.C. 1252 in such a case, because this Court would not yet have applied its holding in *Goldfarb* to the Railroad Retirement Act, or, instead, whether the Court's decision in *Goldfarb* would be deemed sufficiently controlling on the same constitutional question arising under the Railroad Retirement Act that a direct appeal would not have to be taken to this Court.

stead was seeking review only on questions of relief. The court of appeals had jurisditcion over the Secretary's appeal in the instant case for the same reason.

II. IF THE COURT CONCLUDES THAT THE COURT OF APPEALS DID NOT HAVE JURISDICTION, THE COURT SHOULD VACATE THE JUDGMENT BELOW AND REMAND WITH INSTRUCTIONS FOR THE ENTRY OF A NEW JUDGMENT FROM WHICH A DIRECT APPEAL MAY BE TAKEN TO THIS COURT

For the reasons explained in Point I, construing the first paragraph of 28 U.S.C. 1252 in a manner that does not provide for direct appeal to this Court solely on nonconstitutional issues "more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the Act." *FBI* v. *Abramson*, *supra*, 456 U.S. at 625 (footnote omitted). But if the Court nevertheless concludes that the Secretary's appeal should have been taken directly to this Court under 28 U.S.C. 1252 rather than to the court of appeals under 28 U.S.C. 1291, it is respectfully submitted that the appropriate disposition would be to vacate the judgment below and remand to the court of appeals with instructions to remand to the district court for entry of a new judgment from which a direct appeal could be taken to this Court. See *Query* v. *United States*, 316 U.S. 486, 490-491 (1942); see also *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 101 (1974); *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 566 (1972); *Phillips* v. *United States*, 312 U.S. 246, 254 (1941); 28 U.S.C. 2106.

The Court declined to follow this approach in *Donovan* v. *Richland County Association for Retarded*

Citizens, *supra*, because of the Secretary's "simple failure * * * to follow the clear commands of 28 U.S.C. § 1252 and 28 U.S.C. § 1291" (454 U.S. at 390-391; footnote omitted). But in *Donovan*, the Secretary, on appeal, actually sought review of the district court's holding that the Fair Labor Standards Act was unconstitutional as applied. Section 1252 unambiguously provides for a direct appeal in such circumstances. In the instant case, in contrast, even if the Court in the end should disagree with our interpretation of 28 U.S.C. 1252, it cannot be said that Section 1252 contains a comparably "clear command" that a direct appeal be taken to this Court solely on questions of relief. This Court's dismissal of the appeal under 28 U.S.C. 1252 on questions of relief in *Montana Contractors' Association* v. *Kreps*, *supra*, sufficiently refutes any such suggestion.

Moreover, the result in *Donovan* v. *Richland County Association for Retarded Citizens*, *supra*, was simply to leave standing a decision that applied only to one institution in a single state. Here, in contrast, the decision of the district court on relief in this nationwide class action—which conflicts with decisions of two courts of appeals and one district court—will bind the Secretary in the nationwide administration of the Social Security Act. See pages 3-4, 6, *supra*. This result should not be visited on the Secretary, the Trust Fund, and the public without an opportunity for appellate review.[30]

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[30] In considering the appropriateness of this disposition, it is relevant that respondents did not move to dismiss the Secretary's appeal to the court of appeals until June 2, 1982, three days after the Secretary's time in which to file a jurisdictional statement docketing the appeal in this Court had expired. See 28 U.S.C. 2101(a).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the court of appeals for consideration of the Secretary's appeal. However, if the Court concludes that the court of appeals did not have jurisdiction of the appeal under 28 U.S.C. 1291, the Court should vacate the judgment below and remand to the court of appeals with instructions to remand to the district court for entry of a new judgment from which a direct appeal may be taken to this Court pursuant to 28 U.S.C. 1252.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ROBERT S. GREENSPAN
FRANK A. ROSENFELD
Attorneys

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